80-379

No. _____

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN ROBERT JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. Whether under Rule 104(a), Fed. R. Evid., preliminary questions of conditional relevancy regarding co-conspirators' out of court declarations are to be resolved solely by the judge.

2. Whether petitioner's sixth amendment right to counsel was violated by the admission of incriminating statements he made to his cellmate, an undisclosed government informant, after petitioner had been indicted and incarcerated.

3. Whether the cumulative effect of the errors committed below was such a serious denial of petitioner's due process as to warrant reversal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The petitioner, John Robert Johnson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINION BELOW

The judgment of the Court of Appeals was entered on March 4, 1980. *United States* v. *John Robert Johnson,* No. 78-1419 (D.C. Cir. March 4, 1980) (App. A. *infra* 1a-37a). On July 11, 1980, the Court of Appeals issued an order amending the opinion entered on March 4, 1980. (App. B *infra* 38a-40a).

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1980. Petitioner's timely petition for rehearing was denied on March 27, 1980. Respondent's timely petition for rehearing was denied on July 11, 1980. Also on July 11, 1980, the court of appeals issued an order amending the opinion entered on March 4, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. Rule 104 of the Federal Rules of Evidence provides in pertinent part:

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. —Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact.—When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

STATEMENT

In 1977, the government conducted an extensive investigation of a suspected heroin sales ring operating in Washington, D.C. The investigation, conducted by local and federal undercover agents with the assistance of

paid informants, made use of concealed tape recorders and video taping of street activities. It led to the exposure of and cracked the so-called "Stampede Organization," a lucrative and financially successful retail heroin sales operation. The result was a 23 count indictment returned against eight defendants, and, ultimately convictions of six.[1]

The indictment, returned October 11, 1977, charged all defendants with conspiracy to distribute heroin in violation of 21 U.S.C. §846. Each appellant was also named in one or more of the substantive counts charging distribution of or possession with intent to distribute narcotics in violation of 21 U.S.C. §841(a) and 18 U.S.C. §2. The substantive counts closely mirrored the 25 overt acts in the conspiracy count, covering transactions from April 5 to September 29, 1977. Following ten days of trial and seven days of deliberations, the jury convicted all appellants of conspiracy and convicted all but appellant Arthur Watson, of one or more substantive counts.[2] Petitioner was convicted of the conspiracy count and 12 other substantive counts.

Petitioner sought reversal of his conviction on a number of grounds. He contested the propriety of the jury following audio tapes with government prepared

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[1] The appellants before the United States Court of Appeals for the District of Columbia Circuit were: John R. Slade; Odell Johnson, Jr.; Arthur Waston, a/k/a Speed; George N. Marshall; David Redd, a/k/a Slim; and John R. Johnson, a/k/a Stampede (Odell and John R. Johnson are brothers); nos. 78-1333, 78-1409 to 1412, 78-1419 respectively.

[2] Count 23 of the indictment charged appellants Stampede Johnson and Odell Johnson with conducting a continuing criminal enterprise in violation of 21 U.S.C. §848. Both were acquitted thereunder.

and supplied transcripts which had not been reviewed for accuracy by the court at any time. Seven of the narcotics transactions charged in the indictment were recorded on tape machines concealed on the informants. In order to render the recorded conversations comprehensible in court, technicians at the Federal Bureau of Investigation (FBI) electronically enhanced the audibility of the voices, and Detective Kenneth Johnson, with the aid of informants, made transcripts of the conversations that identified the speakers.

Appellants moved to suppress the transcripts, alleging that "it is impossible for the parties herein to agree on what a lot of the spoken words are, and the best evidence of same is the actual tape recordings itself...." The prosecutor represented that the transcripts were accurate, that they aided in understanding the recordings, and that he had invited appellants to assist in preparation of a mutually agreeable version.

At trial, Detective Johnson testified that he collected the tapes as the informants returned from their assignments, stored them with the Drug Enforcement Administration's (DEA's) evidence custodian and turned them over to the FBI for electronic enhancement.

Detective Johnson then drafted preliminary transcripts from the recordings and had the various informants compare the enhanced recordings with the preliminary transcripts for accuracy.

Copies of the final transcripts were distributed to the jury with the admonition that the tapes rather than the transcripts governed, even though it was generally agreed that the tapes were inaudible. (App. A, at 15). The recordings were played for the jury without having been initially reviewed at pretrial and the jurors were

allowed to follow the transcripts. The transcripts were never admitted into evidence.

Petitioner also alleged that repeated references by government witnesses to the "Stampede Organization" or to the "organization" denied him a fair trial, since the references implied the existence of undisclosed proof of such an organization having petitioner as a member, a prejudicial implication allegedly not cured by the trial judge's instructions to the jury to ignore the references.

Also challenged, *inter alia*, was the conspiracy instruction given to the jury. Rather than using the standard instruction that a defendant's membership in a conspiracy may be proven only by his own acts and statements versus those of co-defendants, the judge instructed the jury that in deciding whether a particular defendant on trial was a member of a conspiracy it should consider "all the evidence."

Although not raised below, there are serious doubts as to the propriety of the testimony of prosecution witness Thurston Shrader in light of this Court's recent decision in *United States* v. *Henry;* 48 U.S.L.W. 4703, (U.S. June 16, 1980) (No. 79-121). Prosecution witness Thurston Shrader testified that he was an inmate at the D.C. Jail and became friendly with petitioner several weeks prior to trial. Shrader told petitioner that he had studied law and was somewhat knowledgeable in the subject. As a result, petitioner asked him to review some legal points for him. Shrader believed that petitioner's statements could be of use to him (Shrader) so he summarized their conversations on the blank pages of a book he was reading. The book contained conversations occurring between December 22, 1977 and January 11, 1978.

On January 5, 1978, Shrader wrote to the United States Attorney for the District of Columbia indicating that he had information about petitioner and, if the information was deemed *valuable,* he was willing to cooperate with the government to help himself out of jail (Tr. 1482-1483). On January 6, 1978, he met with Detective Kenneth Johnson and Assistant U.S. Attorneys Leibowitz and Brewer. On the above date, Shrader gave a statement recorded by a stenographer. It appeared that much of the damaging information he testified that petitioner had related to him was not in his recorded statement of January 6, 1978. (Tr. 1488, 1489, 1490, 1491). The book containing notes of the conversations between petitioner and Shrader during the December 22, 1977 to January 11, 1978 period was not turned over to authorities until January 11, 1978. Apparently, the contents of many of the conversations had not been elicited until *after* Shrader's meeting with the government. (Tr. 1358, 1498, 1490, 1491). Between January 6, 1978 (the date Shrader met with the prosecutors) and January 11 (when the book was turned over to the prosecutors), Shrader had conversations with petitioner Johnson. (Tr. 1498).

Upon conviction in the United States District Court, Petitioner Johnson was sentenced to varying consecutive and concurrent sentences aggregating to thirty (30) to ninety (90) years imprisonment and a fine of $150,000.

The United States Court of Appeals for the District of Columbia Circuit held, on March 4, 1980, that none of the alleged errors, considered alone or cumulatively, warranted a reversal of any of the convictions save the conspiracy conviction of appellant Watson in that the Court found that he was improperly impeached by a

misdemeanor firearms conviction not involving dishonesty.

Petitioner's and Respondent's petitions for rehearing were denied on March 27, 1980 and July 11, 1980 respectively. Also on July 11, 1980, the court of appeals issued orders amending various sections of the opinion of the court and the concurring opinion of Senior Circuit Judge Bazelon.

REASONS FOR GRANTING THE WRIT

This case presents an important question as to the scope of Rule 104, Fed. R. Evid. Petitioner submits that Rule 104 does not clearly resolve the ambiguity with regard to whether the judge or the jury should decide the preliminary questions dealing with co-conspirators' out of court declarations. Under subdivision (b) of the Rule (104) such preliminary questions might be couched in terms of relevancy and be for the jury. On the other hand, if they are considered as matters of competence, as the court of appeals concluded, the determination would be for the judge under subdivision (a) of the rule. Thus, this court should clarify the ambiguity in this rule.

Further, review by this Court is warranted not only by the importance of the questions presented but also because the government violated petitioner's sixth amendment right to the assistance of counsel under the principles enunciated by this Court in *United States* v. *Henry,* 48 U.S.L.W. 4703 (1980) and *Massiah* v. *United States* , 377 U.S. 201 (1963). The proper application of the *Massiah* and *Henry* rules that govern post-indictment confrontations between government agents and the accused is of substantial importance. Therefore, it is imperative that prosecutors and the courts unders-

tand the criteria governing admissibility of incriminating statements made by the accused to undercover government informants.

Petitioner urges this Court to grant this writ in order to convert a miscarriage of justice where the court of appeals acknowledged errors but sustained the judgment of conviction.

ARGUMENT

I. The Court Of Appeals' Interpretation Of Rule 104(a) Fed. R. Evid., Is In Conflict With Applicable Principles Previously Enunciated By This Court

In its final charge, the court gave the following conspiracy instruction proposed by the government regarding evidence the jury should consider when determining whether a particular defendant was a member of the alleged conspiracy:

> Now, as to participation in the conspiracy. Once satisfied that the conspiracy charged existed, you must ask yourself who its members were. In deciding whether a defendant on trial before you was a member of the conspiracy, *you should consider whether on all the evidence* that defendant knowingly entered the conspiracy and was a willing participant. (Tr. 2140) (Emphasis added).

By giving this charge, the court deviated from the standard time-tested conspiracy instruction in the "Redbook," Young Lawyers Section, D.C. Bar, *Criminal Jury Instructions,* 302 (3d ed. 1978). The Redbook instruction that defense counsel desired provides in pertinent part, as follows:

> In determining . . .whether [the] [a particular] defendant was knowingly a member of the con-

> spiracy, if such a conspiracy existed, *you may consider only his own acts or statements.* A defendant cannot be bound by the acts or statements or other participants unless or until it is established that a conspiracy existed and that the defendant was one of its members. (Emphasis added).[3]

It is submitted that the instruction given by the court in its final charge was defective since it "allows the jury to consider hearsay statements of a co-conspirator in determining the membership of a particular defendant in conspiracy." (App.A at 25-26) This procedure which allows hearsay to "lift itself by its own bootstraps" has long been rejected by the courts. *See* e.g., *Glasser* v. *United States,* 315 U.S. 60, 74-75 (1942); *United States* v. *Macklin,* 573 F.2d 1046, 1048 (8th Cir. 1978).

In conspiracy trials there is real danger that the jury might transfer, consciously or unconsciously, evidence which is only admissible against one defendant to the other defendant(s). This court in *Glasser, supra,* recognized that it is extremely important that those safeguards be made as impregnable as possible when it stated that "[d]eclarations [of co-conspirators] are admissable. . .only if there is proof *aliunde* that the [the defendant] is connected with the conspiracy. Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." (Emphasis original). As one commentator noted, "[b]y charging the jury that they may not consider co-conspirators' statements until they have found independent proof of the existence of the conspiracy, the policy that led to this corroboration requirement is fulfilled. The charge communicates to the

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[3] A similar instruction appears in Devitt & Blackmar, *Federal Jury Practice and Instructions,* §2705 (3d ed. 1977).

jury the reluctance that exists, as a matter of law, in crediting this evidence. It tells them that the courts recognize its potential unreliability. It alerts them to the danger of unduly trusting the statements." Kessler, *The Treatment of Preliminary Issues of Facts in Conspiracy Litigations: Putting the Conspiracy Back Into the Co-conspirator Rule,* 5 Hofstra L.Rev. 77, 96 (1976) [hereinafter cited as Kessler].

The court of appeals in its affirmation of petitioner's conviction noted that "[s]ince the 1976 Revision of the Federal Rules of Evidence, most of the circuits have expressly held that the judge, not the jury, is to determine the admissibility of alleged co-conspirator statements. These courts have treated the question of admissibility of co-conspirator statements under Rule 801(d)(2)(E), Fed. R. Evid., as one of competence under Rule 104(a), requiring the court to make the preliminary determination on the admissibility of potentially prejudicial evidence." (App. B, at 1); (App. A, at 26); (citation omitted).

The court of appeals went on to say that it recently joined this trend. *Id.* This construction of Rule 104(a) by the court of appeals is repugnant to the Rules' policy of preserving the parties' right to a jury determination on the fundamental issues of the litigation. *See, Kessler, supra* at 89. Moreover, such an interpretation was unwarranted and unauthorized. Under Rule 104(b), Fed. R. Evid., preliminary questions of conditional relevancy regarding co-conspirators out of court declarations must be resolved by the jury. The Advisory Committee on the Proposed Rules recognized that these are appropriate questions for the jury when it observed that "[i]f preliminary questions of conditional relevancy where

determined solely by the judge. . ., the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for the juries." Federal Rules of Evidence 104, Notes of Advisory Committee on Proposed Rules at 41 (1975).

Furthermore, the petitioner has a right to be judged, first, by his own acts. Thus, with all deference, petitioner disagrees with the conclusion below that the permeating error did "not have a cumulative prejudicial effect requiring reversal of petitioner's conviction." (App. A at 33.) Particularly, in the light of the fact the lead conspiracy count — of which petitioner was convicted — was also the key to many of petitioner's convictions on the substantive counts. Similarly, it is no answer to suggest that here the petitioner's "guilt was overwhelming, substantially in the form of tapes" and other uninfected testimony against him. (App. A, at 28). As Mr. Justice Frankfurter observed, "that is the best reason for trying him freed from the inevitable unfairness of being affected by testimony not admissible against him." *Delli Paoli* v. *United States,* 352 U.S. 232, 248 (1956) (Frankfurter, J., dissenting).

The interpretation of Rule 104(a), Fed. R. Evid., by the lower court is such a departure from the accepted and usual allocation of functions between judge and jury "as to call for an exercise of this Court's power of supervision" to correct this miscarriage of justice.

II. The Petition Should Be Granted To Correct The Denial Of Petitioner's Sixth Amendment Rights

In *Massiah* v. *United States,* 377 U.S. 201 (1964), this Court held that Massiah was denied "the basic pro-

tections of . . .[the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.* at 206. Last term in *United States* v. *Henry, supra,* this Court applied *Massiah* and concluded that the admission at trial of incriminating statements made by an indicted, in-custody defendant to his cellmate, who was a paid government informer, violated the defendant's sixth amendment right to counsel. In that case the Court noted that three factors were important in deciding whether Henry's incriminating statements to the informant Nichols were within the meaning of *Massiah*:

> First, Nichols was acting under instructions as a paid informant for the government; second Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols. (48 U.S. L.W. at 4705).

In the instant case, it is undisputed that petitioner Johnson was unaware of Shrader's role as a government informant. Also petitioner was incarcerated and indicted at the time he was engaged in conversation by Shrader. Thus, the last two factors that were considered relevant in *Henry* are present in this case. Similarly, in our view, although Shrader did not receive pecuniary payments for his information, it would be incorrect to say that he was not a "paid informant for the government." Jail inmates who offer to report to authorities statements made by fellow inmates generally expect payment in the form of monetary payments or lenient treatment in their own cases. In either case, there is a *quid pro quo* arrangement. Therefore, although Shrader was motivated by a desire to shorten his jail time by producing

"valuable" information, petitioner submits that he was a "paid informant for the government" within the meaning of *Henry*. Accordingly, the petitioner's sixth amendment right to counsel was violated when the government proved incriminating statements made to his cellmate Shrader, an undisclosed government informant, after his indictment and in the absence of counsel. In addition, the petition should be granted in order to establish the perimeters of *Henry*.

III. The Court Should Grant Certiorari To Prevent A Serious Miscarriage Of Justice In Light Of This Court's Supervisory Role Over The Federal Judicial System

a. The procedure utilized by the courts below allowing the jury to listen to largely inaudible audio recordings with the aid of government prepared transcripts which had not been admitted into evidence was shockingly wrong and a blantant denial of due process.

There is no doubt that large portions of the recordings were inaudible, even after electronic enhancement by the FBI. The court of appeals below stated that "[t]he judge himself commented at times that he could not understand a word of several sections." (App. A, at 15). The correct procedure under these circumstances would have been for the trial judge to hear the recordings out of the presence of the jury in order to rule on objections raised to their admissibility. *See, e.g., Monroe* v. *United States,* 234 F2d. 49, 55 *cert. denied,* 352 U.S. 873 (1956); *United States* v. *Lemonakis,* 484 F.2d 941, 949 (1973), *cert. denied,* 415 U.S. 989 (1974); *Springer* v. *United States,* 388 A.2d 846, 853 (D.C. Ct. App. 1978). The procedure followed below was clearly erroneous but the court of appeals stated that lack of

such a preliminary examination is not *in itself* grounds for reversal. (App. A, at 15).

Another more serious denial of petitioner's due process was the juror's use of government prepared transcripts without such transcripts having been admitted into evidence. The jury made extensive use of the transcripts in that the recordings were of such poor quality. Additionally, the transcripts were never verified by the court as being an accurate description of what was on the recordings. It has been held that the proper procedure to insure accuracy is to have the prosecutor and defense attorneys stipulate to a transcript. *See, e.g., United States* v. *McMillian,* 508 F.2d 101, 106 (8th Cir.), *cert. denied,* 421 U.S. 916 (1974); *United States* v. *Onori,* 535 F.2d 938, 948 (5th Cir. 1976). When it cannot be agreed as to what is on tape, the second alternative is for a trial court to make a pre-trial determination of accuracy by reading the transcript against the tapes. *Springer* v. *United States,* 388 A.2d at 853-54. A third alternative is to present the jury with two transcripts, containing both sides' versions, and let the jury determine which is more accurate. *United States* v. *Onori,* 535 F.2d at 948-49. The court of appeals indicated that the failure of the trial court to review the transcripts was not a *reversible* error in that the defense counsel was invited to submit their own transcripts. Because of the poor quality of the recordings, the transcripts were the real evidence in the case against petitioner. Therefore, to require petitioner to submit transcripts was an invitation for him to give independent evidence against himself.

Moreover, because the recordings were so poor, the transcripts became the evidence upon which the jurors

relied in deciding to convict petitioner. Yet, as aforementioned, the transcripts was never admitted into evidence. In *Onori (supra)* it is stated:

> It is therefore incorrect to think of transcripts as simply an "aid" . . . not as evidence of any kind. They are evidence and, like other evidence, may be admitted for a limited purpose only. That purpose . . . [is] primarily to establish the identity of the speakers at any given time. *Id.* at 947.

In the instant case, the transcripts were not limited to the identification of the speakers but served as the primary evidence upon which the jurors relied in convicting petitioner. The jurors use of the transcript in that way, especially since such was never admitted into evidence, was a shocking deviation from the norm and a blatant denial of due process.

b. The petitioner was denied a fair trial when the trial court did not declare a mistrial after the prosecutor continuously elicited inadmissible and prejudicial hearsay statements from several government witnesses.

In this case the government was obligated to prove that petitioner John Johnson was a member of an organization selling heroin. The prosecutor knew that it was important to nail down the lead defendant, petitioner Johnson, as the head of an illegal organization in order to flush out his case against both petitioner and the lesser co-defendants. All of petitioner's convictions on the substantive counts involved purchases from the organization, although petitioner was not physically present at, or if present did not participate in many of the transactions. Thus, petitioner's conviction on the lead conspiracy count was also the key to many of petitioner's convictions on the substantive counts.

More than 45 years ago this Court noted in *Berger* v. *United States,* 295 U.S. 78 (1935) that "[i]t is as much the duty of the United States attorney to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The prosecutor in the instant case continuously elicited inadmissible and prejudicial hearsay statements from at least 4 of his witnesses after being admonished on several occasions by the court of the consequences for bringing such improper evidence into the trial.

Petitioner's motion for a mistrial was denied in each instance. (Tr. 643, 719, 945-946). As was noted by the court of appeals, "[t]he trial court's several instructions to the prosecutor to avoid a 'worrisome situation,' (Tr. at 311); 'to be a little more careful,' (Tr. at 654); and to stop 'over-trying the case' (Tr. at 657), may have served to limit references to an 'organization,' but obviously did not solve the problem." (App. A, at 22 n.17). As a result of the prosecutor's deliberate illegal tactic the record is replete with references by the several government witnesses to "Stampede's Organization" or "Stampede's dope." (*See, e.g.,* Tr. 263, 267, 370, 617, 703, 938, 944). These misstatements are such that their natural effect is to prejudice petitioner's substantial rights. The court of appeals acknowledged the highly prejudicial nature of these statements when it noted that "[i]t is indisputable that the street term "Stampede's Organization" was the equivalent of the legal term "conspiracy." Nor could one dispute that the ultimate question for the jury was whether such an "organization existed." (App. A, at 22).

The trial judge, it is true, instructed the jury to disregard the misstatements. (Tr.. 973-974, 2162). It is

submitted, however, that because of the enormous amount of inadmissible evidence that was admitted which went to the very heart of the prosecution's case, the curative instruction was insufficient to cure the error. In these circumstances, "[i]t is impossible that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken." *Berger* v. *United States,* 295 U.S. 78 (1935). Accordingly, the proper remedy should have been the granting of a mistrial. As Mr. Justice Jackson observed:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . ., all practicing lawyers know to be unmitigated fiction." *Krulewitch* v. *United States,* 336 U.S. 440 (1949). Cf. *Bruton* v. *United States,* 391 U.S. 123 (1968).

Moreover, it is submitted that applying the standard applied in *Kotteakos* v. *United States,* 328 U.S. 750, 765 (1946), we "cannot say with fair assurance, . . . that the judgment was not substantially swayed by the error."

c. The cumulative effect of all of the errors committed in the trial court warrants the Court to grant the petition in order to prevent a serious miscarriage of justice.

Senior Circuit Judge Bazelon wrote a concurring opinion in *United States* v. *John Robert Johnson,* (App. A, concurring opinion at 1) because he felt ". . . that the number of errors raised on appeal warrants comment." In that opinion, he states:

> Here the prosecution played nearly inaudible tapes for the jury and had the jury read transcripts prepared by the government but never admitted into evidence. Prosecution's witnesses made repeated references to the "organization", although a major issue at trial was the existence of a conspiracy. The

> prosecution also successfully proposed a conspiracy instruction directing the jury to examine "all the evidence", but there is no indication that the trial judge made a determination to admit the co-conspirator hearsay statements included in that evidence." (App. A, concurring opinion at 1) (App. C at 1, Amended concurring opinion).

As pointed out, the procedure in the trial court was rife with errors; yet the trial court, as well as the court of appeals, opined that none of the errors in themselves were of such gravity as to warrant a reversal of petitioner's conviction. In determining whether erroneous conduct prejudiced the minds of the jury, this court stated in *Kotteakos* v. *United States,* 328 U.S. 750:

> But if one cannot say, with fair assurance after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself has substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* at 765.

It is strongly urged that the grant of certiorari is appropriate in the instant case for the appellate decision has deviated from the proper course of judicial proceedings or has so condoned such a course by a lower court, as to require an exercise of this Court's power of supervision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1333

UNITED STATES OF AMERICA

v.

JOHN ROSCOE SLADE, a/k/a "SLAVE",
APPELLANT

No. 78-1409

UNITED STATES OF AMERICA

v.

ODELL JOHNSON, JR.,
APPELLANT

No. 78-1410

UNITED STATES OF AMERICA

v.

ARTHUR WATSON, JR., a/k/a/ "SPEED",
APPELLANT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 78-1411

UNITED STATES OF AMERICA

v.

GEORGE NORMAN MARSHALL, a/k/a/ "LITTLE GEORGE",
APPELLANT

No. 78-1412

UNITED STATES OF AMERICA

v.

DAVID REDD, a/k/a/ "SLIM",
APPELLANT

No. 78-1419

UNITED STATES OF AMERICA

v.

JOHN ROBERT JOHNSON, a/k/a/ "STAMPEDE",
APPELLANT

Appeal from the United States District Court
for the District of Columbia

(D.C. Criminal 77-00632)

Argued January 4, 1979

Decided March 4, 1980

Judgment entered this date

Thomas Lumbard, (appointed by this Court), for appellant in No. 78-1333.

Robert A. W. Boraks, (appointed by this Court), for appellant in No. 78-1412.

William H. Jeffress, Jr., (appointed by this Court), for appellant in No. 78-1410 and 78-1411.

David Niblack, for appellant in No. 78-1409.

Gordon C. Rhea, Assistant United States Attorney with whom *Earl J. Silbert*, United States Attorney, *John A. Terry*, *Peter E. George* and *Barry L. Leibowitz*, Assistant United States Attorneys were on the brief, for appellee.

BEFORE: BAZELON, *Senior Circuit Judge*; WILKEY, *Circuit Judge*, and PARKER,* *United States District Judge* for the District of Columbia

Opinion for the Court filed by *District Judge* PARKER.

Concurring opinion filed by *Senior Circuit Judge* BAZELON.

PARKER, *District Judge*:

In 1977, the government conducted an extensive investigation of a suspected heroin sales ring operating in Washington, D.C. The investigation, conducted by local and federal undercover agents with the assistance of paid informants, made use of concealed tape recorders and video-taping of street activities. It led to the exposure of and cracked the so-called "Stampede organization," a lucrative and financially successful retail heroin sales operation. The result was a 23 count indictment returned against eight defendants and, ultimately, multiple convictions of six. The appellants currently before this Court are John R. Slade; Odell Johnson, Jr.; Arthur Watson, aka Speed; George N. Marshall; David Redd, aka Slim; and John R. Johnson, aka Stampede (Odell and

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

John R. Johnson are brothers); Nos. 78-1333, 78-1409 to 1412, 78-1419, respectively.[1]

The indictment, returned October 11, 1977, charged all defendants with conspiracy to distribute heroin in violation of 21 U.S.C. § 846. Each appellant was also named in one or more of the substantive counts charging distribution of or possession with intent to distribute narcotics in violation of 21 U.S.C. § 841(a) and 18 U.S.C. § 2. The substantive counts closely mirror the 25 overt acts in the conspiracy count, covering transactions from April 5 to September 29, 1977. Following ten days of trial and seven days of deliberations, the jury convicted all appellants of conspiracy and convicted all but appellant Arthur Watson, of one or more substantive counts.[2] A chart listing the counts, the verdicts, and the relevant evidentiary tapes is attached as Appendix A.[3]

Appellants seek reversal of their convictions on four major grounds. They contest the propriety of the jury following audio tapes with government-prepared transcripts which had not been reviewed for accuracy by the court at pretrial. The trial judge afforded defense counsel the opportunity to submit alternative transcripts, and instructed the jurors that their independent understanding of the tapes should supersede the transcripts. Second, they challenge the trial judge's decision barring defense

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[1] Defendant Mary Ann Jones, aka Mary Ann Brown, was not convicted of any count. Defendant Donald Larry Baxter was reported a fugitive and apparently died prior to trial.

[2] Count 23 of the indictment charged appellants Stampede Johnson and Odell Johnson with conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848. Because both were acquitted thereunder, the appeal does not address Count 23.

[3] This chart was prepared by appellate counsel for Watson and Marshall and was referred to by both appellants and government counsel in the briefs.

counsel from using the Saint Elizabeth's psychiatric hospital records of a key government witness, who was released from the hospital in 1974. Third, they allege that repeated references by government witnesses to the "Stampede organization" or the "organization" denied them a fair trial, since the references implied the existence of undisclosed proof of such an organization having appellants as members, a prejudicial implication allegedly not cured by the trial judge's instructions to the jury to ignore the references. Finally, they challenge the conspiracy instruction given to the jury. Rather than using the standard instruction that a defendant's membership in a conspiracy may be proven only by his own acts and statements, versus those of codefendants, the judge instructed the jury to determine the existence of a conspiracy "on all the evidence." Various other grounds for reversal are asserted by particular appellants.

For the reasons outlined in this opinion, none of these alleged errors, considered alone or cumulatively, warrants reversal of the several convictions. The same is true for the matters raised by individual appellants, with one exception, the Appellant Watson. We reverse the conspiracy conviction of Arthur Watson,[4] finding that he was impermissibly impeached by a misdemeanor firearms conviction not involving dishonesty.

In all other respects, we affirm the defendants' convictions.

I.

THE EVIDENCE AND PROCEEDINGS AT TRIAL

The government's witnesses clearly identified all appellants as members of a heroin-distribution ring managed principally by John R. "Stampede" Johnson and his

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[4] Appellant Watson was acquitted of all four substantive distribution counts with which he was charged.

brother Odell Johnson. The ring operated in the 1800 block of 7th Street, N.W., near 7th and T Streets, a neighborhood described as notorious for drug activity. The so-called "Stampede organization" displayed a degree of imagination with members described as sometimes secreting in and dealing heroin from hollowtipped walking canes. On an average day, sales were estimated at as much as $2400 an hour. (Tr. at 262, 771).

The government's investigation of the suspected drug ring began in April and continued to September, 1977. The key figures in the investigation were detective Anthony Patterson and agent Donnie Smith. They were supervised by Detective Kenneth Johnson of the Metropolitan Police Department. Patterson was a seasoned undercover policeman familiar with the 7th and T Streets area and a member of the city police force. Donnie Smith was an experienced Drug Enforcement Administration (DEA) agent. They relied heavily on two paid informants, Allen Whaley and Charles Ward. These four were the government's chief witnesses.

Both Whaley and Ward had histories of drug addiction together with extensive criminal records associated in large part with their drug addiction. The evidence showed that Whaley's use of narcotics continued through the government's investigation which led to the indictment of the appellants. Ward, on the other hand, denied narcotic drug usage in recent years.

A. *Testimony of Detective Patterson and the Informant Whaley*

Detective Anthony Patterson was introduced into the narcotic operations through the informant Whaley. Through this contact he met and dealt with Odell Johnson and Stampede Johnson. Patterson's testimony clearly established that from early April through April 25, 1977,

he had direct personal contact with the two appellants. Through them he arranged for and made narcotic purchases, both directly and indirectly. Through one or more of those appellants he negotiated and arranged for a series of transactions. The detective's testimony supported counts 2 through 6 of the indictment and the criminal involvement of the two Johnson brothers. In the course of his testimony Patterson testified that following one heroin purchase, Bolden remarked that they would "soon see how good Stampede's dope is."

Stampede Johnson's counsel moved for a mistrial based on the detective's testimony recounting several such statements of Bolden and Patterson concerning "Stampede" dope (Tr. at 308-310) labelling certain statements hearsay and another an inadmissible statement by a person not designated as a co-conspirator. The trial judge agreed that a "worrisome situation" existed but denied the motion. At a later time Whaley also testified that he was told by Detective Kenneth Johnson, who supervised both Patterson and Smith, "to purchase some drugs from Stampede's organization." (Tr. at 617). Counsel again moved for a mistrial, claiming that the informant's testimony was prejudicial hearsay. In denying the motion the court's offer of a curative instruction was refused as inadequate. However, the prosecutor was cautioned. (Tr. at 654). On still other occasions there was reference to the "Stampede organization" and the "organization" (Tr. at 685-690). The trial court again denied that appellant's counsel's motion for a mistrial.

Defense counsel sought to discredit Whaley in every possible manner. They secured his admissions that he used heroin regularly and committed acts of larceny throughout the investigation. Under cross-examination, Whaley testified that he had been at Saint Elizabeth's Hospital from 1970 to 1974, having been found not guilty by reason of insanity on an automobile theft charge.

Appellants' counsel also elicited that Whaley received outpatient medical treatment after 1974 and that he had violated medical orders to abstain from narcotic drugs. However, the court refused to afford counsel an opportunity to explore or examine in any detail on Whaley's confinement, diagnosis or treatment or to introduce his medical records, finding the latter "confidential."

B. *Testimony of Agent Smith and Informant Ward*

Special Agent Donnie Smith of DEA testified about his work with informants Ward and Whaley. The testimony of Smith and informant Ward gave particular support to the charges against the Johnson brothers in counts 7, 8 and 9 and specifically against Stampede Johnson and George Marshall on the transactions set forth in count 21 of the indictment. The prosecution's proof on count 21 was supported by a video-tape recording. The tape was shown to the jury and Ward narrated the transaction recorded on film and identified the appellants Marshall, Redd and Stampede Johnson.

Ward and Smith first appeared in the 7th and T Streets area in early May and were engaged in gathering evidence for several weeks. After a lapse of time they reappeared around the first of September. On this occasion, Ward was provided with a recording device worn under his shirt. Ward and Smith made a number of purchases from Stampede Johnson during this period implicating defendants Watson, Marshall, Redd and Jones as well as the Johnson brothers in a number of transactions. Ward and Smith detailed these sales and observations made at these times in testimony supporting a number of substantive counts. Following each drug sale, a report was prepared. Ward admitted that he did not personally prepare the statements he signed; Smith filled in many of the specifics. DEA agents also prepared the transcripts of the tape recording which Ward relied upon in his

testimony. Ward testified as to the accuracy of the transcripts.

During his testimony, agent Smith, as had other witnesses, made references to "Stampede's organization" which led to a motion for mistrial by Stampede Johnson's counsel. The trial court denied the motion and later instructed the jury with regard to these statements.

1. *Impeachment of Informant Ward*

Counsel for Stampede Johnson cross-examined Ward extensively about his drug addiction. He admitted use of heroin and methadone between 1972-76, spending up to $500 a week on heroin while receiving a substantial percentage of his income from DEA. However, he failed to disclose his involvement in illicit drug purchases to the DEA agents. Defense counsel questioned Ward about drug purchases he had made with friends in the 7th and T Street area during the Stampede organization investigation. (Tr. at 507). When asked by the prosecutor whether Ward had purchased narcotics in that area *prior* to his role as an informant, Ward replied that he had bought drugs from "Slade." (Tr. at 591). Counsel for defendant Jones objected because the question concerned a time before the conspiracy. While the court sustained the objection, the motion for a mistrial was denied. (Tr. at 606).

Ward was a very important prosecution witness and he was cross-examined vigorously and a restriction on additional examination was imposed. Although the court limited cross-examination by Johnson's counsel to 45 minutes, defense counsel was allowed to inquire further when his time had elapsed. Johnson's counsel inquired into Ward's criminal record in an attempt to show that after being charged with a felony, a six-month term was obtained with DEA assistance and that arrangements had also been made for the dismissal of certain charges pend-

ing against Ward in Virginia. Ward denied that charges were dismissed due to intervention by DEA authorities.

2. *Use of Recording Devices and Tape Transcripts*

The government provided the two informants with concealed mechanical devices which recorded the conversations and negotiations for drug purchases which they had with several of the appellants. Guilty verdicts on several counts arising from the recordings were returned against Stampede Johnson, Slade and Redd.

Following testimony as to how the tape recordings were electronically enhanced to remove background noise, the recording was played for the jury. (Gov't Ex. 10). The prosecution also provided the jurors with a prepared written transcript of the recording. (Gov't Ex. 11). The transcript was not entered into evidence. At the same time the following instruction was given by the trial judge:

> [T]his paper that has been handed to you is the government's interpretation of what appears on these tapes. However, you will listen to the tapes very carefully and make your own interpretation of what appears on the tapes from what you hear. If you think you hear something differently than the government has interpreted on this paper, then you will follow your own interpretation. (Tr. at 482).

The transcript revealed that portions of the tape were largely unintelligible. The prosecution skipped over large portions of this tape and all subsequent tapes entered into evidence, because of sections identified in the transcripts as "street," "background," or "unidentified" noise.[5]

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[5] For example, at one point the judge stated: "you may have heard it clearly, but, . . . I didn't." (Tr. at 637). *See also* Tr. at 484, 647, 669 and 697.

C. *Additional Prosecution Witnesses*

Other members of the Metropolitan Police Department corroborated the informants' testimony and also offered testimony on actual drug seizures from various locations, connecting the seized drugs with a particular defendant. Expert witnesses in the field of analytical chemistry gave testimony on the technique and procedures of analysis and identified the substances purchased and seized as heroin. Expert fingerprint analysts identified the appellant Watson's fingerprints on several tinfoils in which heroin was wrapped. A DEA agent qualified and testified as an expert witness on drug trafficking and sales on the public streets. He described the typical organization of a narcotics ring and defined the roles of the several participants such as the leader, who does not touch the drugs; the lieutenant, who arranges the transactions; and the runners, who pick up and distribute drugs.

Detective Kenneth Johnson prepared the transcripts of the several tapes made by Ward and Whaley. In testifying he attributed names to certain voices by direct references, but depended on the informants to identify other voices on the tapes. At any rate, he testified that by the time the final typed copies of the transcripts were given to the informants to review, the names of the speakers were alongside the conversations. (Tr. at 1512).

A final prosecution witness, Thurston Shrader, became acquainted with appellant Stampede Johnson a few weeks before trial. At that time both were inmates at the D.C. Jail. He testified in some detail as to various admissions and inculpatory statements of Johnson (Tr. at 1359-63) which supported the charges in the indictment.[6] Shrader

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[6] Shrader testified that he gained Stampede Johnson's confidence by making an exaggerated claim of legal expertise and then helping him with some legal matters.

contacted the United States attorney himself, offering assistance in the hopes of mitigating his own three year sentence for misprision of a felony and, presumably, any punishment for pending embezzlement charges.[7] There was no indication that Schrader operated as a "plant" in any contact with the prosecution or the police.

D. *The Defense Evidence*

Appellants Stampede Johnson, Odell Johnson, John Slade and George Marshall did not testify or offer any testimony or evidence.

Appellant Arthur Watson took the stand, identified himself as a 31-year-old part-time truck driver, and testified that he frequented the establishments in the 1800 block of 7th Street. He knew Odell Johnson from childhood and was acquainted with all other defendants. He denied the testimony of the informant Ward, attributing to him the nickname "Speed," or that he had a beard before October, 1977. While he admitted knowing Allen Whaley, he denied ever seeing Ward or ever having sold narcotics to either. He could not explain how his fingerprints happened to appear on tinfoils of drugs recovered in the investigation and admitted in evidence at the trial.

On cross-examination, the prosecutor asked Watson whether he had been convicted in May, 1976, of carrying

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[7] In 1973, Shrader was to have been a witness against his sister's fiance, who was charged in federal court with kidnapping and extortion. Under the government Witness Protection Program, Sharder was given a new name and job. When he learned that the fiance had been released and knew his whereabouts, Shrader fled, taking along $600 belonging to his employer. The government located him three years later and charged him with misprision for concealing evidence and with embezzlement. Shrader pled guilty to misprision and, at the time of his testimony, the embezzlement charges were pending.

a dangerous weapon, specifically a gun. (Tr. at 1591). Watson replied in the affirmative. His counsel moved for a mistrial claiming improper impeachment on a misdemeanor gun charge, having no connection to credibility. (Tr. at 1591). The motion was denied and the prosecutor did not pursue the questioning. Watson did not receive his requested opportunity to explain the circumstances of the conviction. Only the next morning did the court instruct the jury to disregard the fact that Watson was convicted of a misdemeanor gun charge when considering his credibility, since the gun conviction did not involve dishonesty or a false statement. (Tr. at 1721).

Appellant David Redd, a clerk typist at the Pension Benefit Guarantee Corporation since 1976, called his supervisor who gave alibi testimony that he was at work on September 29, 1977. A co-worker testified that he drove Redd to the area that day during lunch hour and waited one half hour while Redd bought heroin for himself. A supervisor at the D.C. Superior Court Narcotics Treatment Administration Office testified that the 7th and T area has a reputation as a place where drugs can be easily purchased, and that it was common knowledge that addicts pooled their money to purchase large quantities of drugs to get more for their money.

Finally, Redd himself took the stand and testified that he had been an addict before starting a methadone program, and frequented the 1800 block of 7th Street N.W. According to Redd, he socialized in the area but did not buy drugs from Whaley. He recognized himself on both the audio and video tapes of September 29, but stated that Whaley gave him money to pool in order to buy heroin for the two of them.

II.

LEGAL ANALYSIS

A. *Prosecutor's Use of Tapes and Transcripts*

The major objection presented by all appellants is that the trial judge permitted the jury to listen to the largely inaudible tape recordings of Whaley's and Ward's drug purchases. To facilitate an understanding and so that the jury could follow the tapes with a minimum of difficulty government-prepared transcripts were shown to the jury but never admitted into evidence. We conclude that while better procedures could have been adopted for dealing with and presenting the tapes and transcripts during trial, the court's rulings do not constitute reversible error.

1. *Tape Recordings*

Admission of tape recordings at trial rests with the sound discretion of the trial court. *Monroe v. United States*, 98 U.S. App. D.C. 228, 234, 234 F.2d 49, 55, *cert. denied*, 352 U.S. 873 (1956).

The first criterion for admission is that the tapes be authenic, accurate and trustworthy. *United States v. Haldeman*, 181 U.S. App. D.C. 254, 330, 559 F.2d 31, 107 (1976), *cert. denied sub nom, Mitchell v. United States*, 431 U.S. 933 (1977). There is no serious dispute here as to the authenticity of the original tape recordings or the electronically-filtered copies played in court. The government presented extensive testimony as to the collection and custody of the original tapes, *see, e.g., United States v. McMillan*, 508 F.2d 101, 104 (8th Cir.), *cert. denied*, 421 U.S. 916 (1974), as well as the techniques used in the electronic enhancement. The testimony showed that the enhanced copies, which lowered or deleted background noise, had been compared to the originals for accuracy by an experienced FBI technician

and Detective Kenneth Johnson. *Fountain v. United States*, 384 F.2d 624, 631 (5th Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968); *United States v. Knohl*, 379 F.2d 427, 440 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967). Both sets of tapes were entered into evidence.

A second criterion for admission is that the tapes be audible and comprehensible enough for the jury to consider the contents. The appellants challenge the procedure and merits of the trial judge's decision, made without listening to the tapes out of the jury's presence, to admit allegedly unintelligible tape recordings.[8] As to the procedural objections, an alternative course would have been for the trial judge to verify the audibility of the tapes at pretrial rather than waiting to hear the tapes for the first time when played before the jury. *Monroe*, 98 U.S. App. D.C. at 234, 234 F. 2d at 55; *United States v. Lemonakis*, 158 U.S. App. D.C. 162, 170, 485 F.2d 941, 949 (1973), *cert. denied*, 415 U.S. 989 (1974); *Springer v. United States*, 388 A.2d 846, 853 (D.C. Ct. App. 1978). However, the lack of such a preliminary examination is not in itself ground for reversal. *United States v. Bryant*, 480 F.2d 785, 789 (2d Cir. 1973).

As to the merits, there is no question but that parts of the recordings were inaudible. The judge himself commented at times that he could not understand a word of several sections. Tapes are admissible, however, unless "the unintelligible portions are so substantial as to render the recording as a whole untrustworthy." *Monroe*, 98 U.S. App. D.C. at 234, 234 F.2d at 55; *United States v.*

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[8] The trial judge also denied a pretrial motion to exclude use of the transcripts, based in part on the poor quality of the tapes, without listening to the tapes or making any findings as to the quality of the tapes. The prosecutor alone asked the court to examine the tapes and transcripts for audibility and accuracy. Defense counsel heard the tapes and examined the transcripts before trial.

Jones, 540 F.2d 465, 470 (10th Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977). This was not the case here.

Indistinct portions were clarified by a second playing and the jury listened to the tapes again during deliberation. *See, e.g., Bryant*, 480 F.2d at 790. The court, jurors, and counsel indicated, when asked, that they had understood relevant sections played. (Tr. at 638, 640, 644). The tapes were sufficiently clear to allow the prosecutor and counsel for defendant Jones to reach general agreement on transcripts. The tapes were narrated by Ward and Whaley and, as this Court found in *Monroe*, *supra*, problems caused by poor quality tapes are minimized when "a witness who heard the statements recorded also testifies, so that the recordings give independent support to his testimony." 98 U.S. App. D.C. at 234, 234 F.2d at 55. While appellants refer to Ward and Whaley as unreliable witnesses, the credibility issue was for the jury. Finally, though this raises another issue addressed below, the jurors had the benefit of transcripts to guide them past the background noise and irrelevant conversation. Given all these factors, the trial court did not abuse its discretion in admitting the tape recordings into evidence and allowing the enhanced copies to be played for the jury.

2. *The Prepared Transcripts*

Voicing objections that are somewhat parallel though more serious than those raised in connection with the actual tape recordings, the appellants challenge the propriety of the jurors' use of the government-prepared transcripts. While the transcripts were not admitted into evidence, the jurors followed the transcripts while listening to the tapes during the trial. Given the poor quality of the tapes, we assume the jury made substantial use of the transcripts. Beyond the predictable allegations that the transcripts were inaccurate, appellants Redd and

Slade claim that the transcripts served as an indirect—and unconstitutional—method of identifying them as participants in heroin sales.

It is within the trial court's discretion to allow the jury to use an accurate transcript "to assist them in listening to [a] tape." *McMillan*, 508 F.2d at 105; *Springer*, 388 A.2d at 853. The need for a transcript tends to arise where, as here, portions of a tape were relatively inaudible and the identity of speakers was not automatically clear to a listener. *United States v. Onori*, 535 F.2d 938, 947 (5th Cir. 1976); *McMillan*, 508 F.2d at 105; *United* States v. Hall, 342 F.2d 849, 853 (4th Cir.), *cert. denied*, 382 U.S. 812 (1965). Because a transcript is only meant to be a guide to evidence—the tape being played—it is important that the judge instruct the jurors that their personal understanding of the tape supersedes the text in a transcript. *Onori*, 535 F.2d at 949; *McMillan*, 508 F.2d at 106. Appropriate instructions were given whenever a tape was played, and this is not disputed. (Tr. at 482, 636, 668, 678, 691, 716).

The ideal procedure for testing accuracy is to have the prosecution and defense attorneys stipulate to a transcript. *McMillan*, 508 F.2d at 106; *Onori*, 535 F.2d at 948; *Bryant*, 480 F.2d at 791. When they cannot agree as to what is on tape, the second best alternative is for the trial court to make a pretrial determination of accuracy by reading the transcript against the tapes. *Springer*, 388 A.2d at 853-54. In either situation the jury receives a transcript, certified as a correct version of the tape. A third alternative is to present the jury with two transcripts, containing both sides' versions, and let the jury determine which is more accurate. *Onori*, 535 F.2d at 948-49. In this situation, because no one transcript is presented as "correct," the judge "need not necessarily listen to the tapes or pass on the accuracy of any transcript." *Id.*

In these cases, the defense counsel vigorously challenged the accuracy of the transcripts, largely because the tapes from which they were made were poor. Rather than comparing the tapes and transcripts at pretrial,[9] the court invited the defense counsel to submit their own transcripts. As discussed above, this ruling was not *per se* an abuse of discretion. *Onori*, 535 F.2d at 948-49. It is certainly not judicial error that defense counsel did not —or could not—utilize the opportunity. *Id.*[10]

Under the circumstances, the Court finds that the jury's access to government-prepared transcripts was not reversible error, for two reasons. First, through defense objections and the court's cautionary instructions, the jury was made aware that the transcripts offered only the government's interpretations. The repeated instructions served to eliminate any prejudice that may have resulted from discrepancies between tape and transcript. *Bryant*, 480 F.2d at 791. There is no evidence that the tapes were so poor that the jurors could not compare the tapes and transcripts and that the transcripts became in effect the real evidence.

Second, the record provides substantial support for the relative accuracy of the transcripts. Detective Kenneth Johnson testified concerning the preparation of the transcripts. *See, e.g., Bryant*, 480 F.2d at 790-91. He developed preliminary drafts from the original tapes, identifying the informants from personal knowledge and other voices by references. Johnson then would play and review the tapes with the informants to determine who

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[9] *See* n.8 *supra* and accompanying text.

[10] Indeed, only counsel for defendant Jones accepted the prosecutor's invitation to participate in preparation of a mutually agreeable version, and the prosecutor thereafter changed the transcript in several ways requested by counsel. Apparently the government made further changes later.

was talking. Both informants testified that the enhanced tapes and transcripts corresponded accurately. (Tr. at 396-97, 635). Finally, while the tapes were played in court, the informants identified the speakers and explained what was taking place.

Appellants Redd and Slade raise an additional objection to the transcripts, based on what they view as "a highly suggestive identification process." [11] They contend that government agents actually identified the voices on the tape by supplying drafts with names to the informants, a procedure they claim to be more prejudicial than the single photograph identification struck down in *Mason v. United States*, 134 U.S. App. D.C. 280, 286, 414 F.2d 1176, 1182 (1969).

The record simply does not support this due process argument. The informants did have an active role in identifying voices for the transcripts. There is no question of their competence to identify the voices.[12] There was evidence that Whaley had substantial connections with Stampede Johnson, Slade and Redd—the appellants convicted on counts involving conversations taped by Whaley—from times before the investigation.[13] *Fountain*, 384 F.2d at 632. *See also McMillan*, 508 F.2d at 105. The agents' testimony and the videotape corroborated the voice identifications.

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[11] Brief for appellant John Roscoe Slade at 15.

[12] Whaley's dependence on the transcripts during testimony presumably was taken into account by the jury in evaluating credibility.

[13] The only audio tape made by Ward, in connection with Count 18, did not lead to convictions. For this reason, the Court does not address Slade's objections that there is less evidence of Ward's participation in transcript preparation than there is of Whaley's.

In sum, while the identification process was not perfect, due in large part to the poor quality of the original tapes, the process in no way violated appellants' constitutional rights. Nor is a remand required on grounds that the presence of names in the transcripts "suppl[ied] ersatz corroboration of testimonial identification." [14]

B. *The St. Elizabeth's Hospital Records of Informant Allen Whaley*

Prior to Whaley's cross-examination the defense announced its intention to offer the records of that informant's confinement for mental illness at St. Elizabeth's Hospital. Objections were presented by the prosecutor on grounds that Whaley had been released prior to his activities as an informant. The court ruled that the record was "confidential" and would not be admitted into evidence. (Tr. at 859).

Counsel were allowed to establish only that Whaley was at St. Elizabeth's from 1970 to 1974 after a finding of not guilty by reason of insanity to a burglary charge; that he was in an outpatient treatment program in April, 1976, when he was found "socially rehabilitated;" and that he was under medication only on a limited basis. The court did not allow defense counsel to inquire of any diagnosis or treatment received or to use the hospital report to impeach his claim that he never used LSD.

Given the importance of Whaley's testimony to the government's case and his uncertain credibility, the appellants contend that the trial court's restriction of cross-examination into his medical records was reversible error.[15] The government argues that the court made a

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[14] Brief for appellant David Redd at 12.

[15] Appellants are led by Redd in this argument, since he was convicted almost solely on the basis of Whaley's testimony.

"proper balance of their marginal probative worth and their high potential for prejudice and confusion." [16]

However, the trial court did not attempt to strike any balance between the relevance and potential prejudice of the evidence, but rather pronounced the records "confidential" without explanation. This ruling was an abuse of discretion. Rule 403, Fed. R. Evid. Nowhere in the record did anyone raise the privilege of confidentiality, and the appellants' views on the privilege are nowhere fully aired.

It is not necessary to make a determination whether the St. Elizabeth's records or their contents were admissible, a task made impossible by the paucity of the record. For purposes of this appeal, we assume that Whaley's mental health history was relevant to his credibility as a witness to 1977 events. *Sinclair v. Turner*, 447 F.2d 1158, 1162 (10th Cir. 1971), *cert. denied*, 405 U.S. 1048 (1972). The court also assumes that this relevance outweighed any personal harm that would be caused by disclosing this history, *United States v. Honneus*, 508 F.2d 566, 573 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975), and that appellants had a right to cross-examine him in detail about his St. Elizabeth's records to attack his credibility. *United States v. Partin*, 493 F.2d 750, 763 (5th Cir. 1974), *cert. denied*, 434 U.S. 903 (1978). Even so, on the basis of Whaley's complete testimony, the trial court's refusal to admit details of his St. Elizabeth's stay is not reversible error.

The jury knew, courtesy of the prosecutor, that Whaley was an addict and a thief who was paid for informing on his friends. During an extensive cross-examination, Whaley admitted that he continued to use heroin and commit larceny throughout the investigation, that he had an extensive criminal record, and that he hoped to avoid imprisonment by cooperating with DEA. The jury learned

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[16] Brief and Appendix for Appellee at 20.

that Whaley was committed to St. Elizabeth's mental hospital for criminal insanity in 1970, remained there for four years, and was treated as an outpatient for two more years. Defense counsel elicited the fact that Whaley resumed his heroin habit after release against doctors' orders. Given all this evidence, the Court cannot find that details about Whaley's mental illness, or additional impeachment by reference to statements he may have made to St. Elizabeth's doctors about LSD use, would have significantly affected the jury's evaluation of his credibility or swayed the verdicts. *Kotteakos v. United States*, 328 U.S. 750 (1946).

C. *References to Stampede's Organization*

In this conspiracy the prosecution was obligated to prove that John "Stampede" Johnson, assisted by his brother Odell, managed an organization selling heroin. All the substantive counts involve purchases from the organization. It is indisputable that the street term "Stampede's organization" was the equivalent of the legal term "conspiracy." Nor could one dispute that the ultimate question for the jury was whether such an "organization" existed.

Appellants therefore all objected to repeated references by the several government witnesses to "Stampede's organization" or "Stampede's dope." In addition to raising hearsay objections, they argue that the witnesses thereby implied that the police had evidence beyond that introduced at trial that such an organization existed, in contravention of *United States v. Hilliard*, 186 U.S. App. D.C. 312, 569 F.2d 143 (1977). They contend that the trial court's lukewarm reprimands to the prosecutor [17]

[17] The trial court's several instructions to the prosecutor to avoid a "worrisome situation," (Tr. at 311); "to be a little more careful," (Tr. at 654); and to stop "over-trying the case" (Tr. at 657), may have served to limit references to an "organization," but obviously did not solve the problem.

and the belated instructions to the jury to disregard such references did not temper the inherent prejudice.

We disagree with the government's characterization of such references as having been "occasional" and "spontaneous." The remarks appear at several points in the record. They are highlighted by defense motions for mistrial, all denied.

These comments were unnecessary since each witness could just as easily have testified to a purchase of narcotics or plans to meet with Stampede Johnson. Additionally, they were improper since they essentially constituted the legal conclusion that a heroin distribution conspiracy existed. The prosecutor admitted as much when he justified such a reference as opinion evidence by "a witness who is familiar with how the operation works." (Tr. at 652). The problem with this explanation is that Smith, Patterson, Whaley and Ward were not expert witnesses, nor was a foundation laid for lay witness opinion testimony under Rule 701, Fed. R. Evid.

Despite the argument of appellant Stampede Johnson, there is no evidence that the prosecutor deliberately elicited the phrase "organization" from his witnesses. Once the improper statements were made, the court gave appropriate instructions to the jury to ignore them. (Tr. at 973-74).

While the several references to "Stampede's organization" in the record are unfortunate, they do not create a "campaign of suggestion" equivalent to that in *United States v. Hilliard, supra*, where the defendant was indicted under the *aka* "Meatball" for armed robbery of a postal employee. The government presented substantial testimony against a subject named "Meatball," but no admissible evidence that Hilliard was ever known as "Meatball." The Court reversed the conviction, finding that

> the inevitable result of the prosecutor's repeated questions and references to Meatball and the suspect discovered by the investigation was to splash the defendant with damaging matter that was not in evidence.

186 U.S. App. D.C. at 315, 569 F.2d at 146.

In comparison, the prosecution here presented substantial independent evidence of the crimes charged in the indictment. The extensive testimony, augmented with audio and video tapes, clearly showed that appellants were participants in a heroin sales network operating under Stampede Johnson's direction.[18] The references to "Stampede's organization" did not insinuate the existence of substantive evidence that was not presented to the jury, but rather that government agents at the start of the investigation had some reason to believe that a ring involving Stampede Johnson was selling heroin. The references were almost always made in the context of a government agent and/or an informant starting out on some new phase of the investigation. It is not incumbent on the government to prove why it suspected a conspiracy, but only that a conspiracy existed and the named defendants were members.

The references were unnecessary since the jury could presume as a matter of common sense that the government had some basis to investigate this group of defendants. Viewing the overwhelming substantive evidence in this case, it is also a matter of common sense that the specific references to "Stampede's organization" did not shape the jury's thinking or cause the jury to find a conspiracy among the appellants. Applying the standard

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[18] The appellants do not contest that John R. Johnson's alias was Stampede, a fact clearly proven by government witnesses. The appropriate analogy here for Hilliard/"Meatball" is "Stampede's organization"/conspiracy.

applied in *Kotteakos v. United States*, 328 U.S. 750, 765 (1946) we cannot find that the judgment was "substantially swayed" by the error and therefore will not reverse the convictions on this ground.

D. *The Challenged Conspiracy Instruction*

The trial court gave the following jury instruction as to the evidence that may be considered in determining a particular defendant's membership in the alleged conspiracy:

> Now, as to participation in the conspiracy. Once satisfied that the conspiracy charge[d] existed, you must ask yourself who its members were. In deciding whether a defendant on trial before you was a member of the conspiracy, *you should consider whether on all the evidence*, that defendant knowingly entered the conspiracy and was a willing participant. (Emphasis added.) (Tr. at 2140).

In doing so the court accepted the government's requested charge, rather than the standard instruction for conspiracy in the "Redbook," Young Lawyers Section, D.C. Bar, *Criminal Jury Instructions* 302 (3d ed. 1978). The Redbook instruction provides:

> In determining . . . whether [the] [a particular] defendant was knowingly a member of the conspiracy, if such a conspiracy existed, *you may consider only his own acts or statements.* A defendant cannot be bound by the acts or statements of other participants unless or until it is established that a conspiracy existed and that the defendant was one of its members. (Ephasis added).[19]

Unlike the Redbook instruction, the instruction actually given allows the jury to consider hearsay statements of

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[19] The Second Edition of the Redbook, in use at the time of trial, contained a virtually identical instruction. The same standard instruction appears in Devitt & Blackmar, *Federal Jury Practice and Instructions*, ¶ 2705 (3d ed. 1977).

a co-conspirator in determining the membership of a particular defendant in the conspiracy.

Several appellate courts have adopted the "all the evidence" instruction given by the trial court here. *United States v. James*, 590 F.2d 575 (5th Cir.) *cert. denied*, 99 S. Ct. 2836 (1979); *United States v. Santiago*, 582 F.2d 1128, 1133 (7th Cir. 1978); *United States v. Bell*, 573 F.2d 1040, 1043-45 (8th Cir. 1978); *United States v. Martorano*, 557 F.2d 1, 11-22 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978); *United States v. Stanchich*, 550 F.2d 1294 (2d Cir. 1977); *United States v. Trowery*, 542 F.2d 623, 626-27 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977). These courts have treated the question of the admissibility of co-conspirator statements under Rule 801(d)(2)(E), Fed. R. Evid., as one of competence under Rule 104(a), requiring the court to make the preliminary determination of the admissibility of potentially prejudicial evidence. *See, e.g., James*, 590 F.2d at 579-80; *Santiago*, 582 F.2d at 1133. The court therefore bears the responsibility of determining whether the evidence of conspiracy and its membership is strong enough to allow the jury to consider the co-conspirator statements.

Although there may be a good basis for the Rule 104(a) competency approach, we do not find it appropriate to approve it as the rule for this circuit especially given the circumstances of these appeals.[20] The trial record re-

[20] Defense counsel never specifically objected to the "all the evidence" charge offered by the government, though they discussed the conspiracy instruction at length with the judge and the prosecutor. (Tr. at 1400-20). *See* Henderson v. Kibbe, 431 U.S. 145, 154 (1977). This is not to say, as the government argues, that the issue has not been preserved on appeal. There is no question but that defense counsel desired the standard Redbook conspiracy instruction (Tr. at 1097) and specifically objected to any deviation from that "time-tested" instruction. (Tr. at 1446).

flects no analysis or even awareness of the goals behind the Rule 104(a) competency approach. This Court cannot assume, despite the government's argument, that the judge implicitly made the requisite initial determination of admissibility of co-conspirator statements.[21] Without such a determination, the judge's use of the "all the evidence" instruction is questionable even in those jurisdictions that employ that instruction. Especially in the instant cases, marred by references to "Stampede's organization," the judge's failure to use the standard Redbook instruction was improper. In any event, since the trial in this case, this circuit has expressly repudiated the "all the evidence" instruction.[22]

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[21] As appellants Watson and Marshall point out in their reply brief, even assuming that this ruling shows the trial judge did make a preliminary determination of admissibility, it remains probable that he himself considered "all the evidence," including co-conspirator statements, in finding that defendants had been shown to be conspirators. In no way did the trial judge specify what standard of proof he thought appropriate.

[22] In two recently decided cases, United States v. Jackson, No. 78-1768 (D.C. Cir. Jan. 29, 1980) and United States v. Gantt, No. 78-1399 (D.C. Cir. Jan. 25, 1980), this circuit held that the existence of a conspiracy and a defendant's participation therein must be shown by substantial *independent* evidence; co-conspirators statements may not be considered. *Accord* "Redbook" instruction, n.19 *supra* and accompanying text. However, in determining the illegality of the conspiracy, the jury *may* consider hearsay statements of co-conspirators. United States v. Jackson, slip op. at 33. Consequently, the court may admit the hearsay statements "subject to connection" or on the basis that the conspiracy has been shown to exist by substantial independent evidence. Jackson, slip op. at 41; Gantt, slip op. at 27.

If the evidence is admitted "subject to connection" and the government fails to prove the necessity connection, the court may strike the hearsay testimony and instruct the jury to disregard it. Jackson, slip op. at 39; Gantt, slip op. at 26. Once the court has found that the government *has* made the

Despite the foregoing, the evidence of guilt was overwhelming, substantially in the form of tapes and independent evidence against each appellant. Co-conspirator statements and references to "Stampede's organization" were not a significant part of the prosecution's case. Only two appellants here point to potentially damaging co-conspirator hearsay. As we today reverse the conviction of appellant Watson on other grounds,[23] we need not reach the prejudice to him from the instruction error. As for appellant Marshall, we find that he was not prejudiced by the instruction error. He was convicted only on the count for which a video-tape documented the offense. The jury apparently was able to consider Marshall's role as distinguished from the totality of evidence; the jury acquitted Marshall of the four other charges against him. *See Appendix A.*

The several appellants' convictions on the conspiracy count, based on the given jury instruction as to conspiracy membership, will not be disturbed.

E. *Improper Impeachment of Arthur Watson*

Of the several challenged convictions presented in this appeal we find merit only in the claim of the appellant Watson. He was the victim of improper impeachment and his conviction on the conspiracy count should be reversed.

On cross-examination, the prosecutor impeached Watson with a misdemeanor conviction for possessing a pistol without a license, 22 D.C. Code § 3204. The court denied

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requisite showing and has admitted the hearsay statements, the court should apply the traditional standard of guilt beyond a reasonable doubt in determining whether to submit the entire case to the jury. Jackson, slip op. at 41. The court considers all of the evidence in making this determination. *Id.*

[23] *See* section E *infra.*

a mistrial motion, and gave a cautionary instruction only the next day and in final instructions.

This impeachment was clearly improper under Rule 609(a), Fed. R. Evid., which allows use of a prior conviction to impeach a witness only if the crime 1) was punishable by death or imprisonment for more than one year or 2) involved dishonesty or a false statement. The crime of carrying a pistol without a license is not one that may be used for impeachment. *United States v. Millings*, 175 U.S. App. D.C. 293, 535 F.2d 121 (1976). *See also United States v. Dorsey*, 192 U.S. App. D.C. 313, 591 F.2d 922 (1978).

Since this error does not reach constitutional dimensions, *United States v. Smith*, 179 U.S. App. D.C. 162, 180, 551 F.2d 348, 366 (1976), the question on appeal is whether the impeachment was more than harmless if the Court, looking at the case as a whole, can "say, with fair assurance, . . . that the judgment was not substantially swayed by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

The Court cannot make such a statement here. The jury did not believe most of the evidence against Watson. He was acquitted of four substantive counts. The two informants were the principal prosecution witnesses on those counts and Ward's identification was not the strongest. (Tr. at 571-72 and 1566). The proof on one of the counts also included expert testimony that Watson's fingerprints were on a tinfoil of drugs.

The four counts covered four of the six overt acts naming Watson in the conspiracy count. Two overt acts concerned meetings with informant Allen Whaley in early September, 1977. In the final analysis, the jury had to balance Whaley's testimony plus evidence that Watson's fingerprint appeared on a tinfoil recovered from the tree against Watson's testimony that he frequented the area

for innocent reasons, in part because he was friendly with other defendants. Whaley was not the most credible witness. The fingerprint evidence could not have been weighty, since Watson was not indicted in connection with the cache of heroin in the tree.

Under these circumstances, the Court cannot find that the jury was not ultimately swayed by the improper evidence of Watson's misdemeanor gun conviction to convict him of conspiracy. *See Millings*, 535 F.2d at 121; *Smith*, 179 U.S. App. D.C. at 179, 551 F.2d at 365-66. *Compare United States v. Belt*, 169 U.S. App. D.C. 1, 514 F.2d 837 (1975). This is especially so where an attempt at a curative instruction did not come until the day following the testimony. *United States v. Carter*, 157 U.S. App. D.C. 149, 151-52, 482 F.2d 738, 740-41 (1973). In fact, because the judge repeated the impermissible testimony about Watson's gun possession conviction in making the instruction, the prejudice was highlighted and likely compounded.

Examining this record as a whole we find that the impeachment of Watson's credibility with a misdemeanor gun conviction was reversible error. His conspiracy conviction is reversed and his case is remanded for a new trial.

III.

Additional Legal Issues Presented

Other issues have been raised by the appellants. While they warrant some comment, in no event are they grounds for reversal of any conviction.

A.

Appellant Stampede Johnson contends that his Sixth Amendment confrontation rights were violated when cross-examination of government witnesses Charles Ward

and Thurston Shrader was restricted by the trial court. Following several questions about Ward's drug usage, his paid informant status, and a sentence for a prior conviction, further examination was limited to 45 minutes. Specifically his counsel was denied opportunity to discover the identity of certain associates of Ward's at the time of a particular drug purchase.

A trial judge may and must exercise discretion to limit cross-examination into collateral matters. *Glasser v. United States*, 315 U.S. 60 (1942); *Howard v. United States*, 128 U.S. App. D.C. 336, 341, 389 F.2d 287, 292 (1967). While the time limitation may have placed a degree of pressure on Johnson's counsel, who then indicated that the schedule interfered with his preparation and concentration, under the circumstances of these cases and the matters explored, the restriction of cross-examination was not an abuse of discretion or prejudicial. *See Alford v. United States*, 282 U.S. 687, 692 (1931).

The fact remains that counsel conducted a long and thorough cross-examination of Ward. We cannot find that the limitations on the cross-examination were sufficiently disconcerting or substantively improper to call for reversal on constitutional grounds. *See United States v. Pugh*, 141 U.S. App. D.C. 68, 72, 436 F.2d 222, 226 (1970); *Howard*, 128 U.S. App. D.C. at 341, 389 F.2d at 291-92.

Appellant also raises a Sixth Amendment challenge because of restrictions in the cross-examination of Thurston Shrader, a white prisoner held at the D.C. Jail. Counsel was granted full opportunity to discredit Shrader and otherwise to lay bare Shrader's obvious self-motivation to shorten his jail time by producing "good" evidence. The trial court properly sustained the prosecutor's objections and was warranted in limiting further questioning when it appeared that tangential matters were being explored.

B.

Appellant Slade alleges reversible error because on redirect examination by the prosecution, the informant Ward identified him as having sold narcotics at a time prior to the conspiracy. Slade was not charged in the indictment with that particular sale. Objection to Ward's testimony was sustained by the trial court and a motion for a mistrial was denied. (Tr. at 591-606). Rule 404(b), Fed. R. Evid., providing for the inadmissibility of prior bad acts, was applicable here.

However, we do not find Ward's statements sufficiently prejudicial to disturb Slade's conviction. Both informants Ward and Whaley testified against Slade on various counts of the indictment. As it developed it appears that the jury was not convinced by any of Ward's testimony against Slade. No convictions on the distribution counts against the appellant were based on Ward's testimony. The other evidence presented against Slade was substantial, was properly submitted to the jury, and resulted in convictions on four substantive counts as well as the conspiracy.

C.

Appellant Redd claims prejudicial joinder in light of the serious disparity of evidence against him as compared to the other defendants. His motion for severance was denied. The indictment placed him in the area of the narcotic transactions on only several occasions.

The trial court has great discretion in severance matters, with the balance generally to be "struck in favor of joint trials." *United States v. Hines*, 147 U.S. App. D.C. 249, 266, 455 F.2d 1317, 1334, *cert. denied*, 406 U.S. 975 (1972).

Absent a dramatic disparity of evidence, any prejudice caused by joinder is best dealt with by instructions to

the jury to give individual consideration to each defendant. *United States v. Haldeman*, 181 U.S. App. D.C. 254, 295, 559 F.2d 31, 72 (1976), *cert. denied*, 431 U.S. 933 (1977).

The government's case against Redd included testimony of the informant Whaley together with audio and video tapes of the sales. The evidence was independent and substantial. The trial judge properly instructed the jury to determine the guilt or innocence of each defendant separately. (Tr. at 2165-66). The record simply does not show that Redd's conviction was prejudicially based on evidence against his co-defendants.

IV.

CONCLUSION

In this appeal, the appellants have jointly and individually raised several challenges to their convictions before the trial court. The multitude of issues is not surprising, since the complex indictment charged all defendants with conspiracy and with substantive crimes arising from participation in a complex heroin sales ring. Because drug conspiracy cases invite difficulties at the trial level, we have reviewed the evidence and considered the arguments in great—perhaps tedious—detail.

We have delineated and discussed several problem areas in this extensive record. Given the overwhelming independent evidence against the appellants, the errors which are discussed do not have a cumulative prejudicial effect requiring reversal of the convictions. The one exception is the conspiracy conviction of appellant Arthur Watson, which is reversed and remanded for a new trial due to improper impeachment. The convictions of all other appellants are affirmed.

APPENDIX A

COUNT	DATE	PURCHASER(S)	TAPES	DEFENDANTS	VERDICT
2	April 5	Patterson	none	O. Johnson	Guilty
3	April 8	Patterson	none	J. R. Johnson O. Johnson	Guilty Guilty
4	April 12	Patterson	none	J. R. Johnson	Guilty
5	April 13	Patterson	none	J. R. Johnson	Guilty
6	April 21	Patterson	none	J. R. Johnson	Guilty
7	May 4	Ward/Smith	none	J. R. Johnson Watson	No Verdict Not Guilty
8	May 5	Ward/Smith	none	J. R. Johnson	Guilty
9	May 17	Ward/Smith	none	O. Johnson	Not Guilty
10	June 8	Whaley	none	O. Johnson	Not Guilty
11	June 15	Whaley	Audio	J. R. Johnson	Guilty
12	June 15	(narcotics seized from mailbox)	none	J. R. Johnson O. Johnson	Guilty Not Guilty
13	June 21	Smith	none	J. R. Johnson Slade	Not Guilty Not Guilty

14	June 23	Whaley	Audio	J. R. Johnson O. Johnson Slade Marshall Redd	Guilty Not Guilty Guilty Not Guilty Guilty
15	June 23	(narcotics seized from tree)	none	J. R. Johnson O. Johnson Slade Marshall Redd	Guilty Not Guilty Guilty Not Guilty Not Guilty
16	July 26	Whaley	Audio	J. R. Johnson Slade	Guilty Guilty
17	Aug. 18	Whaley	none	J. R. Johnson Watson Slade	Not Guilty Not Guilty Not Guilty
18	Sept. 1	Ward/Smith	Audio	O. Johnson Watson Slade Jones	Disagreement Not Guilty Not Guilty Not Guilty
19	Sept. 22	Ward	none	Slade Marshall Jones	Disagreement Not Guilty Not Guilty

COUNT	DATE	PURCHASER(S)	TAPES	DEFENDANTS	VERDICT
20	Sept. 28	Ward/Smith	none	J. R. Johnson	Not Guilty
				O. Johnson	Not Guilty
				Watson	Not Guilty
				Slade	Not Guilty
				Marshall	Not Guilty
21	Sept. 29	Ward/Smith	Video	J. R. Johnson	Guilty
				Marshall	Guilty
22	Sept. 29	Whaley	Video and Audio	J. R. Johnson	Guilty
				Slade	Guilty
				Redd	Guilty

BAZELON, *Senior Circuit Judge, concurring*: I agree with my brethren that the errors complained of did not contribute to conviction, *see Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963), except as to appellant Watson. *See* pp. 28-30 *supra*. I write separately because I believe that the number of errors raised on appeal warrants comment.

It is not surprising that errors may occur in a trial of connected, complex cases, prosecuted zealously. Here, the prosecution played nearly inaudible tapes for the jury and had the jury read transcripts prepared by the government but never admitted into evidence. Prosecution witnesses made repeated references to "the organization," although a major issue at trial was the existence of a conspiracy. The prosecution also successfully proposed a conspiracy instruction that differs significantly from the one required in this circuit.

As this court's opinion elaborates, each of these problems could have been avoided by observing settled precedents: the trial court should have considered the tapes at pretrial rather than waiting to hear them in the presence of the jury; similarly, it should have determined the accuracy of the transcripts before permitting the jury to read them; it should not have accepted the nonstandard conspiracy instruction that directed the jury to consider "all the evidence"; it should at least have ruled on the competency and admissibility of co-conspirator statements swept into evidence against individual defendants by the nonstandard instruction. Finally, it ought to have framed its initial reprimand with sufficient firmness to ensure that references to "the organization" were not repeated.

Although we find the practices complained of are harmless here, they are not approved. Evidence of guilt must not obscure our commitment to fairness.[1]

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[1] *Cf.* Harrington v. California, 395 U.S. 250, 256 (1969) (Brennan, J., dissenting) ("The focus of appellate inquiry should be on the character and quality of the tainted evidence as it relates to the untainted evidence and not just on the amount of untainted evidence.").

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 78-1333

Criminal No. 77-00632

UNITED STATES OF AMERICA

v.

JOHN ROSCOE SLADE, A/K/A SLAVE,

Appellant

And Consolidated Case Nos. 78-1409, 78-1410, 78-1411, 78-1412 and 78-1419

Before: BAZELON, Senior Circuit Judge; WILKEY, Circuit Judge, and PARKER*, United States District Judge for the District of Columbia

Order

Filed: July 11, 1980

It is ORDERED, by the Court, *sua sponte*, that the Opinion for the Court filed by District Judge Parker on March 4, 1980 be, and it hereby is, amended as follows:

Middle of Page 25:

replace "standard instruction" in line 19 with "the defense's requested instruction";

at the end of that sentence, add footnote 20 from page 26 of the slip opinion (and renumber it n.19);

renumber old n. 19 to be new n. 20 and strike "standard", second line from the bottom.

* Sitting by designation pursuant to 28 U.S.C. §292(a).

Page 26:

Replace the first sentence of the first full paragraph with:

"Since the 1976 revision of the Federal Rules of Evidence, most of the circuits have expressly held that the judge, not the jury, is to determine the admissibility of alleged co-conspirator statements.";

Replace the first sentence of the final paragraph with:

"This court recently joined this trend in our decisions in *United States* v. *Gantt*, No. 78-1399 (D.C. Cir. Jan. 25, 1980) and *United States* v. *Jackson*, No. 78-1768 (D.C. Cir. Jan. 29, 1980). These two cases required the trial judge to determine the existence of a conspiracy and the defendant's participation in that conspiracy by "substantial independent evidence" before permitting the jury to consider the challenged co-conspirator statements in its deliberations. *See Jackson*, slip op. at 41; *Gantt*, slip op. at 25-27. They also require the trial court to find by substantial independent evidence that the co-conspirator statements were made in furtherance of the conspiracy in which the defendant participated. *See Gantt*, slip op. at 25. The preferred practice is for the trial court to make these determinations before the hearsay evidence is admitted. The court retains discretion, however, to admit particular co-conspirator statements conditioned on later showing of substantial independent evidence of the three prerequisites for their admission. *See Jackson*, slip op. at 38-39.[21] A fair implication of

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[21] If the evidence is admitted "subject to connection" and the government fails to prove the necessary connection, the court should strike the statements and instruct the jury to disregard it or else declare a mistrial. *Jackson*, slip op. at 39; *Gantt*, slip op. at 26. If the court instead finds that the government has made the requisite showing and has admitted the statements, the court should apply the traditional standard to all the evidence in determining whether to submit the entire case to the jury. *See Curley* v. *United States*, 160 F.2d 222, 232 (D.C. Cir. 1947), *cert. denied*, 331 U.S. 837.

these cases is also that where the trial judge has made the required preliminary determinations, and decided that the hearsay statements are admissible, he may charge the jury to consider the defendant's substantive guilt based upon "all the evidence" presented. *See Gantt*, slip op. at 27. (1947) (judge to determine whether "a reasonable mind might fairly conclude guilt beyond a reasonable doubt")"

Page 27:

Renumber present footnote 21 to become n.22; replace "probable" in fourth line of that note with "possible";

Delete the word "Without" on line 5 and all of lines 6 through 13, inclusive, and insert in lieu thereof the following:

"Without such a determination, the judge's use of the 'all the evidence' instruction is questionable. The underlying premise for the 'all the evidence' instruction is that the trial judge has previously made an independent determination that the co-conspirator statements included in that evidence are admissible. *See Gantt*, slip op. at 25. Especially in the instant cases, which were marred by reference to 'Stampede's organization,' we are disturbed by the trial judge's use of the 'all the evidence' instruction with no indication that he made the requisite preliminary determinations of admissibility."

Present footnote 22 is deleted in its entirety.

Per Curiam

For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 78-1333

Criminal 77-00632

UNITED STATES OF AMERICA

v.

JOHN ROSCOE SLADE, A/K/A SLAVE,

Appellant

And Consolidated Cases Nos. 78-1409, 78-1410, 78-1411, 78-1412 and 78-1419

Before: BAZELON, Senior Circuit Judge

Order

Filed: July 11, 1980

It is ORDERED, by the Court, *sua sponte*, that the concurring opinion filed by Senior Circuit Judge Bazelon on March 4, 1980 be, and it hereby is, amended as follows:

2d paragraph, last sentence, change to read:

"The prosecution also successfully proposed a conspiracy instruction directing the jury to examine "all of the evidence", but there is no indication that the trial judge made a determination to admit the co-conspirator hearsay statements included in that evidence."

3rd paragraph, lines 7-12, change to read:

"read them; and it should not have directed the jury to consider "all the evidence" without at least first ruling

explicitly on the competency and admissibility of co-conspirator statements swept into evidence against individual defendants by the instruction. Finally, it ought to have framed"

Per Curiam

For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Supreme Court, U. S.
FILED
NOV 12 1980
MICHAEL RODAK, JR., CLERK

No. 80-379

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN ROBERT JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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JOHN ROBERT JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the procedure followed by the trial court in admitting extrajudicial co-conspirator statements constituted reversible error.

2. Whether petitioner's right to counsel was violated by the admission of incriminatory statements he made to a jailhouse acquaintance after he had been indicted.

3. Whether the admission of tape recordings of narcotics transactions, the use of government-prepared transcripts by the jury, and references by several government witnesses to "Stampede's organization" denied petitioner due process of law.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 627 F.2d 293.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1980. Petitioner's petition for rehearing was denied on March 27, 1980. The government's petition for rehearing was denied on July 11, 1980, at which time the court of appeals issued an order amending its opinion. The petition for a writ of certiorari was filed on September 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of conspiracy, in violation of 21 U.S.C. 846, and numerous substantive offenses involving distribution of or possession with intent to distribute narcotics, in violation of 21 U.S.C. 841(a) and 18 U.S.C. 2 (Pet. App. 4a, 34a-36a).[1] Petitioner was sentenced to a total of 30 to 90 years' imprisonment and a fine of $150,000. The court of appeals affirmed (Pet. App. 1a-40a).

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[1]The jury acquitted petitioner on a count charging him with conducting a criminal enterprise, in violation of 21 U.S.C. 848, as well as on three counts charging violations of 21 U.S.C. 841(a) (Pet. App. 4a n.2, 34a-36a). Co-defendants John R. Slade, Odell Johnson, Jr., Arthur Watson, George N. Marshall and David Redd were all convicted of participation in the same narcotics conspiracy, and all but Arthur Watson were also convicted on one or more substantive counts. Co-defendant Mary Ann Jones was acquitted on all counts.

The government's evidence detailed 21 separate heroin sales from April to October, 1977, to government agents by members of a heroin distribution ring under the management of petitioner and his brother, Odell Johnson, Jr. The so-called "Stampede organization," named after petitioner's alias, "Stampede" Johnson, operated in the neighborhood of 7th and T Streets, N.W., Washington, D.C., and grossed an estimated $2,400 an hour on some occasions (Tr. 262, 771).

The government's four chief witnesses were detective Anthony Patterson, DEA agent Donnie Smith, and two paid informants, Allen Whaley and Charles Ward. All four witnesses testified concerning narcotics purchases they had made through petitioner, many of which were recorded on audio and video tape (Pet. App. 6a–10a). The informants' purchases were closely monitored. Smith or Patterson searched the informants before each transaction, gave them money to purchase the drugs, and usually accompanied them to 7th and T Streets to watch the transactions take place. A DEA chemist analyzed the contraband and in each case found it to contain heroin (Tr. 1222-1230, 1236-1253).

Other members of the Metropolitan Police Department corroborated the informants' testimony and also testified concerning drug seizures from various locations, connecting the seized drugs with particular defendants (Pet. App. 11a). A final prosecution witness, Thurston Shrader, became acquainted with petitioner in jail about a month before the trial began and kept a journal of his conversations with him (Tr. 1353-1358). He testified as to various admissions and inculpatory

statements petitioner made to him, which supported the charges in the indictment (Pet. App. 11a; Tr. 1359–1363). Petitioner and most of his co-defendants did not testify or offer any evidence in their defense.

ARGUMENT

1. Petitioner's first objection relates to the manner in which the jury was instructed with regard to consideration of co-conspirator declarations. Petitioner asserts (Pet. 8–11) that the trial court committed reversible error in instructing the jury as follows with regard to the evidence that it could consider in determining a particular defendant's membership in the alleged conspiracy (Pet. App. 25a; emphasis added):

> Now, as to participation in the conspiracy. Once satisfied that the conspiracy charge[d] existed, you must ask yourself who its members were. In deciding whether a defendant on trial before you was a member of the conspiracy, *you should consider whether on all the evidence*, that defendant knowingly entered the conspiracy and was a willing participant.

In response to petitioner's challenge to the instructions, the court of appeals first noted (Pet. App. 39a) that, since the 1976 revision of the Federal Rules of Evidence, "most of the circuits have expressly held that the judge, not the jury, is to determine the admissibility of alleged co-conspirator statements,"[2] and

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[2] *United States* v. *James*, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Andrews*, 585 F.2d 961 (10th Cir. 1978); *United States* v. *Santiago*, 582 F.2d 1128, 1133 (7th Cir. 1978); *United States* v. *Bell*, 573 F.2d 1040, 1043–1045 (8th Cir. 1978); *United States* v. *Martorano*, 557 F.2d 1, 11–12 (1st Cir.), aff'd on rehearing, 561 F.2d 406

that it had recently joined this trend in its decisions in *United States* v. *Gantt*, 617 F.2d 831 (1980) and *United States* v. *Jackson*, No. 78-1768 (D.C. Cir. Dec. 28, 1979). Petitioner's assertion (Pet. 10-11) that admissibility of the evidence was for the jury to determine is therefore without merit, and he cites no appellate decision supporting his position that conflicts with the decision below on this point.

The court also concluded that implicit in these decisions is that "where the trial judge has made the required preliminary determinations, and decided that the hearsay statements are admissible, he may charge the jury to consider the defendant's substantive guilt based upon 'all the evidence' presented" (Pet. App. 40a). Here, the court stated (*ibid.*) that it was "disturbed" by the trial judge's use of the "all the evidence" instruction because there was "no indication that he made the requisite preliminary determinations of admissibility."[3] Despite this, the court determined that petitioner suffered no prejudice, and it therefore declined to overturn his conviction (Pet. App. 28a). The court found the evidence of guilt "overwhelming" and also noted that co-conspirator statements were "not a significant part of the prosecution's case" (*ibid.*). Indeed, as the court noted (*ibid.*), only

(1977), cert. denied, 435 U.S. 922 (1978); *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978); *United States* v. *Stanchich*, 550 F.2d 1294 (2d Cir. 1977); *United States* v. *Trowery*, 542 F.2d 623, 626-627 (3d Cir. 1976), cert. denied, 429 U.S. 1104 (1977).

[3]The Second Circuit has held that the making of such a preliminary determination of admissibility may be inferred where the trial judge denied the defendant's motion for a directed verdict of acquittal. *United States* v. *Ziegler*, 583 F.2d 77, 80 n.5 (2d Cir. 1978) (collecting Second Circuit cases).

petitioner's two co-defendants, Watson and Marshall, pointed to any potentially damaging co-conspirator hearsay statements. In these circumstances, petitioner's claim of reversible error is without merit.

2. Petitioner next contends (Pet. 5-6, 11-13) that the admission of incriminating statements he made to a jail acquaintance, Thurston Shrader, after he had been indicted, violated his Sixth Amendment right to counsel. However, petitioner concedes (Pet. 5) that he did not object to the admission of Shrader's testimony at trial on this ground and that he also failed to raise this issue in the court of appeals. He therefore appears to have waived this claim, and, in any event, it is not now properly presented for review. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's claim is without merit on the record presented. Petitioner asserts that Shrader's role was similar to that of Nichols, the paid government informant in *United States* v. *Henry*, No. 79-121 (June 16, 1980). However, Shrader's role was more analogous to that of Henry's other cellmate, Sadler, who informed government agents of Henry's incriminating admissions on the advice of counsel. Because Sadler was not a paid government informant and had no prior arrangement with the government to monitor or report on conversations with Henry, there was no question regarding the admissibility of his testimony. See *United States* v. *Henry*, *supra*, slip op. 3 n.3. Shrader's role in the present case was similar. As the court below stated (Pet. App. 11a-12a; footnote omitted):

> Shrader contacted the United States attorney himself, offering assistance in the hopes of mitigating his own three year sentence for misprision of a felony and, presumably, any punishment for pending embezzlement charges. There was no indication that Shrader operated as a "plant" in any contact with the prosecution or the police.

This account is supported by the record (Tr. 1476–1501).

Petitioner points out (Pet. 6) that some of his statements to which Shrader testified were not contained in a written statement Shrader gave to the Assistant United States Attorney at the time of his initial meeting with the Assistant on January 6, 1978; that Shrader did not turn over to the government the book containing his notes of petitioner's statements until January 11; and that Shrader had some conversations with petitioner between January 6 and January 11. From these observations, petitioner would have us infer that some of petitioner's statements to which Shrader testified occurred *after* Shrader's January 6 meeting with the Assistant United States Attorney and therefore after the point at which Shrader arguably became a government informant. However, although the record shows that the substance of certain portions of Shrader's testimony was not also included in his written statement of January 6, this does not in itself demonstrate that Shrader overheard those particular statements after the January 6 meeting. Moreover, in response to a question by petitioner's counsel as to whether he "pumped" petitioner for information after January 6, Shrader testified (Tr. 1499):

> No sir, I did not. And I was heavily warned by the United States Attorney not to do so. And I

> mentioned that in the diary, in the journal itself, that I was admonished that I could not seek any information once I had talked to him, I could not work as an informant or any type of agent on that related case. Actually, the reason for my continued writing was for other related matters.

Thus, Shrader understood that he could not "seek any information" or "work as an informant" after the January 6 meeting.[4] Petitioner has not shown that Shrader's role was different from what he described. Furthermore, to the extent that Shrader obtained petitioner's confidence while the two men were in custody together, this occurred prior to the time that Shrader first contacted authorities and therefore prior to the time that he could be regarded as a government informant. Compare *United States* v. *Henry*, *supra*, slip op. 6–7. In these circumstances, it cannot be said that the government "intentionally creat[ed] a situation likely to induce [~~Shrader~~ Petitioner] to make incriminating statements without the assistance of counsel" (*id.* at 10).[5]

3. Petitioner also argues (Pet. 13–18) that he was denied a fair trial because (a) the trial court admitted

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[4]This would appear not to be a case, then, in which the informant was free, under the instructions given him, to elicit statements in ways less direct than asking questions or initiating conversations with the defendant about the charges against him. Compare *United States* v. *Henry*, *supra*, slip op. 7 n.8.

[5]In any event, in light of the other compelling evidence against petitioner, much of it in the form of audio and visual tapes, any error in the admission of Shrader's testimony as to statements made by petitioner after January 6 (assuming there were any) was harmless. Compare *United States* v. *Henry*, *supra*, slip op. 10–11 n.13; *Milton* v. *Wainwright*, 407 U.S. 371 (1972).

tape recordings of Whaley's and Ward's drug purchases that were partially inaudible; (b) the court allowed the jurors to make use of government-prepared transcripts when listening to the tapes; and (c) the court declined to declare a mistrial when government witnesses made references to "Stampede's organization" or "Stampede's dope." These fact-bound claims are fully addressed by the court of appeals' opinion, upon which we rely (Pet. App. 14a–20a, 22a–25a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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